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NORTHERN DISTRICT OF CALIFORNIA

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*Attorneys for Plaintiffs Perseus Distribution, Inc.  
and Perseus Books, L.L.C.*

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

CV 08

0044

PERSEUS DISTRIBUTION, INC.,  
and PERSEUS BOOKS, L.L.C.,

Plaintiffs,

v.

CF COMMUNICATIONS, LLC  
d.b.a TELEKENEX, INC.

Defendant.

Case No.

PLAINTIFFS' APPLICATION FOR  
TEMPORARY RESTRAINING ORDER  
AND MOTION FOR PRELIMINARY  
INJUNCTION

Date:

Time:

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PLEASE TAKE NOTICE that, pursuant to Civil Local Rule 65-1, Perseus Distribution, Inc. ("Perseus Distribution") and Perseus Books, L.L.C. ("Perseus") (collectively, "Plaintiffs" or "Perseus Distribution/PGW"), by and through their undersigned counsel, hereby seek a temporary restraining order and order to show cause re preliminary injunction requiring Defendant CF

1 Communications, LLC d.b.a Telekenex, Inc. ("Telekenex") to release certain telephone and  
2 facsimile numbers identified below (collectively referred to as the "PGW Phone/Fax numbers") and  
3 permit Perseus to "port" those numbers to a new telecommunications carrier. Plaintiffs' application  
4 is made on the ground that immediate and irreparable injury will result to Plaintiffs unless  
5 Telekenex releases the PGW Phone/Fax numbers, and will be based on this application, the attached  
6 Declaration of Susan Reich in support of Plaintiffs' application, and the [Proposed] Temporary  
7 Restraining Order and Order to Show Cause re Preliminary Injunction lodged concurrently  
8 herewith.

9 **FACTUAL BACKGROUND**

10 The relevant facts are set forth in the attached declaration of Susan Reich, who is the  
11 President of Perseus Distribution, Inc. ("Reich Decl."). Perseus Distribution is a book distributor.  
12 *Id.* ¶ 3. Effective on or about September 28, 2007, Perseus Distribution purchased the business  
13 assets of Publishers Group West ("PGW"), a book distributor located in Oakland, California  
14 including the Publishers Group West and PGW trade names, telecommunications assets, and other  
15 assets in a transaction approved by the U.S. Bankruptcy Court for the District of Delaware. *Id.* ¶ 3.  
16 Since that date, Perseus Distribution has used the business assets of PGW, including its phone  
17 numbers.

18 For approximately the past 10 years, PGW has used the following telephone and fax  
19 numbers in the conduct of its business:

20 510 528 1444 Main Phone

21 510 528 3444 Main Fax

22 510 528 5511 Sales Fax

23 510 528 7211 Executive Fax

24 510 528 8167 Credit Fax

25 510 528 9555 Marketing Fax

26 510 558 0156 Publisher Services Fax

27 510 558 0422 Human Resources Fax

1 800 261 7503 IT Dial In Pool

2 800 788 3122 Customer Service line

3 (together the "PGW Phone/Fax numbers").

4 During this period of time, significant value in the PGW Phone/Fax numbers has  
5 accumulated -- they are known and recognized by Perseus customers as being uniquely associated  
6 with Perseus Distribution/PGW's business. *Id.* ¶ 5.

7 From 2003 to November 16, 2007, Defendant Telekenex has been the local exchange carrier  
8 for the PGW Phone/Fax numbers. In November, 2007, Perseus Distribution/PGW notified  
9 Telekenex of its intent to change carriers. Perseus Distribution/PGW made this decision due to  
10 poor telephone service by Telekenex, including instances of service interruption. *Id.* ¶ 6.

11 Thereafter, on December 14, 2007 Perseus Distribution/PGW switched local carriers from  
12 Telekenex to TelePacific Communications. On the afternoon of December 14, 2007, Telekenex  
13 notified Perseus Distribution/PGW for the first time that it would not release the PGW Phone/Fax  
14 numbers to TelePacific Communications, *Id.* ¶ 8, stating that it first wanted an early termination fee.

15 Perseus Distribution/PGW made the decision to switch carriers based in part on Perseus  
16 Distribution/PGW's understanding that it had the legal right to "port" the PGW Phone/Fax numbers  
17 to its new carrier. *Id.* ¶ 9.

18 Perseus Distribution/PGW immediately notified Telekenex that its action in holding hostage  
19 the PGW Phone/Fax numbers was unjustified and would cause serious harm to the Perseus  
20 Distribution/PGW business. During discussions in mid-December 2007, Telekenex responded by  
21 saying that it would not release the numbers unless Perseus Distribution/PGW paid a so-called  
22 "early termination fee" of \$120,000. *Id.* ¶ 10. Perseus Distribution/PGW is unaware of any valid  
23 basis for this demand for an early termination fee.

24 Telekenex is still holding the PGW Phone/Fax numbers. Currently, if a customer attempts  
25 to use any of the PGW Phone/Fax numbers, the customer gets only a busy signal. Notwithstanding  
26 Perseus Distribution/PGW's repeated requests that Telekenex release the PGW Phone/Fax  
27 numbers, Telekenex has refused or failed to respond. *Id.* ¶¶ 12-14.

## ARGUMENT

### **I. LEGAL STANDARD**

Entry of a temporary restraining order is appropriate when the movant can demonstrate a likelihood of success on the merits; irreparable harm; that the balance of hardships favor entry of the TRO; and that entry of the TRO is in the public interest. *See Posdata Co. Ltd. v. Kim*, 2007 WL 1848661 \*4 (N.D. Cal. Jun. 27, 2007) (granting TRO); *FTC v. Optin Global, Inc.*, 2005 WL 1027108 (N.D. Cal. Apr. 13, 2005) (same); *Echostar Satellite, LLC v. Viacom, Inc.*, 2004 WL 439984 (N.D. Cal. Jan. 16, 2004) (same). Plaintiffs' application satisfies each of these elements.

### **II. PLAINTIFFS ARE ENTITLED TO A TEMPORARY RESTRAINING ORDER**

#### **A. Plaintiffs Are Likely to Succeed on the Merits**

Telekenex's conduct violates the Federal Telecommunications Act Local Number Portability Rules requiring local exchange carriers to provide local number portability. Federal law requires carriers to permit customers to port numbers. Under 47 U.S.C. § 251(b)(2), each carrier has "[t]he duty to provide, to the extent technically feasible, number portability in accordance with the requirements prescribed by the Commission." *See also* 47 CFR § 52.21-33 (implementation regulations); *Todco, Inc. v. Nextel West Corp.*, 2005 WL 1174220 \*4 (N.D. Ind. Apr. 28, 2005) (recognizing that "there is no doubt" that plaintiffs have a private right of action to enforce Section 251(b)(2)). Furthermore, the FCC expressly denies carriers the right to refuse to port customers' numbers, *even if customers owe money for an outstanding balance or termination fee*. *See* FCC Consumer Fact Sheet, available at <http://www.fcc.gov/cgb/consumerfacts/numbport.html> (last visited Jan. 3, 2008), attached hereto as Exhibit A. Thus, Telekenex's purported justification – that Plaintiffs owe a so-called "early termination fee" – cannot be used to preclude number portability. *See id.* Accordingly, Plaintiffs are likely to succeed on the merits because Telekenex has violated the Local Number Portability Rules without any legitimate justification.

**B. Plaintiffs Will Suffer Irreparable Harm If Telekenex Is Not Immediately Enjoined**

Plaintiffs are suffering immediate and irreparable harm in that they are unable to use telephone and facsimile numbers that they have used in their business for a decade. Customers cannot get through to Plaintiffs' business, and this situation is causing loss of customers and also undermining customers' faith in Plaintiffs' business. Reich Decl. at ¶¶ 10, 13. Accordingly, Plaintiffs are facing immediate and irreparable harm.

**C. The Balance of Hardships Favors Entry of the TRO**

Immediate release of the PGW Phone/Fax numbers will allow Perseus to reconnect with its customers and continue its business without any further interruption, thus preserving the status quo that existed for at least the 4 years in which Telekenex provided local exchange service to PGW. On the other hand, Telekenex's release of these numbers would not cause Telekenex any harm whatsoever. To the extent Telekenex believes it has a valid claim for an "early termination fee," it may pursue such claim in the PGW bankruptcy or in a separate action. Under these circumstances, the balance of hardships tips decisively in favor of entry of the TRO and preliminary injunction pending the resolution of this matter.

**D. The Public Interest Favors Entry of a TRO and Preliminary Injunction**

It is in the public interest for this Court to enforce the Telecommunications Act, including the requirement that telecommunications carriers permit the porting of telephone and facsimile numbers.

**III. A MINIMAL BOND IS APPROPRIATE IN THIS CASE**

Should the Court enjoin Telekenex, Plaintiffs will provide a bond pursuant to Rule 65(c) of the Federal Rules of Civil Procedure and Local Rule 65.1-1(c). Given that this case presents a single legal issue and that responding to the issue is unlikely to be burdensome, Plaintiffs suggest that a bond in the amount of \$1,000 is more than sufficient protection.

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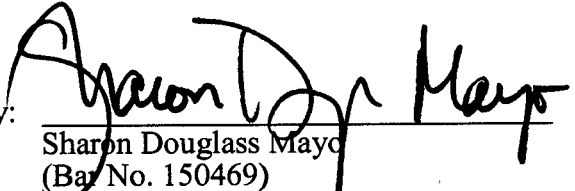
CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter the accompanying [Proposed] Temporary Restraining Order and Order to Show Cause re Preliminary Injunction requiring Telekenex to release the PGW Phone/Fax numbers.

Dated: January 4, 2008

ARNOLD & PORTER LLP

By:

  
Sharon Douglass Mayo  
(Bar No. 150469)  
Randall K. Miller  
(subject to admission *pro hac vice*)  
Attorneys for Plaintiffs Perseus  
Distribution, Inc. and Perseus Books,  
L.L.C.

**EXHIBIT A**



## Consumer & Governmental Affairs Bureau

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[FCC site map](#)

# Keeping Your Telephone Number When You Change Your Service Provider

## FCC Consumer Facts

### Background

Under the Federal Communications Commission's (FCC's) "local number portability" (LNP) rules, so long as you remain in the same geographic area, you can switch telephone service providers and keep your existing phone number. If you are moving from one geographic area to another, however, you may not be able to take your number with you. These rules have applied for some time to wireless and most traditional, wireline telephone companies. In addition, the FCC recently extended the LNP rules to interconnected Voice over Internet Protocol (VoIP) providers and determined that the rules would also apply to small wireline telephone companies that have not been granted waivers from the rules by their state public utility commissions. Therefore, subscribers remaining in the same geographic area can now switch from a wireless, wireline, or VoIP company to any other wireless, wireline, or VoIP company and still keep their existing phone numbers.

### Initiating the Process

If you want to change companies:

- **Do not** terminate your service with your existing company **before** initiating service with the new company.
- Contact the new company, which will start the process of porting your number by contacting your current company.
- Be aware that when terminating service with a wireless company, you may be obligated to pay any early **termination fees** under your existing contract. Also, when terminating service with any company, you are usually required to pay any outstanding balance owed. Review your bill or contract to determine what fees or charges apply. Once you request service from the new company, however, your old company **may not refuse to port your number, even if you owe money** for an outstanding balance or termination fee.
- You may request service from a new company at any time.

### Fees and Charges



- Companies porting your phone number to a new provider are allowed to charge a fee to recover their number porting costs. Companies may or may not choose to charge a fee, and their fees may vary. If they do charge specific fees, the fees cannot exceed their porting costs. Companies that assess the fee generally charge a fixed monthly fee and may do so for up to five years.
- Even if companies decide to charge for porting, they may not refuse to port a number because a consumer has not paid the porting fee.
- Additionally, some companies may choose to pay the old company's costs of porting for the benefit of their new customers. **Ask your new company** whether it has a policy of paying or reimbursing these charges.

## The Porting Period

Your new telephone company can usually give you a good idea about how long the porting process will take. To keep the process as short as possible, the FCC recently clarified that companies may not obstruct or delay number porting by requiring your new company to provide extensive information before porting your existing telephone number. In addition, the FCC clarified that validation for a simple number port should require no more than the following information: (1) 10-digit telephone number; (2) customer account number; (3) 5-digit zip code; and (4) pass code, if it applies. The FCC is also considering imposing additional requirements to make LNP more efficient, including shortening porting periods for simple ports. As of now, in general:

- For a **wireless-to-wireless** transfer, your phone number should work within a few hours of your request to change wireless providers.
- A **wireline-to-wireless** transfer may take several business days to complete. **Ask your new** wireless company whether you will be able to continue using your current wireline number during the transfer process.
- If you port from a **wireline phone to a wireless phone**, your wireline long distance company **will not** move with you. Your long distance service will generally be provided by your new wireless company, but you should verify this with the new wireless company before changing service providers. For wireline-to-wireless porting, there may be a period of "mixed service," when you essentially have two telephones with the same number during the adjustment period.

**Note:** Certain small wireline companies may have an exemption from the porting requirements if they have received a waiver from their state public utilities commission. Customers who want to port a wireline number to a wireless phone, and are told that they cannot, should contact their state public utility commission to find out whether their wireline carrier has been granted a waiver. A directory of state utility commissions can be found at [www.naruc.org/commissions.cfm](http://www.naruc.org/commissions.cfm).

## Emergency Services

In some areas, 911 operators automatically receive the phone number or location of a wireless call, but, in many areas, they do not. Technology that will provide that information – Enhanced 911 or "E911" – is currently being implemented, but is not yet available using many wireless phones and in many parts of the country.

As noted above, during the porting process from the old company to the new company, there may be a period of "mixed service" - when you may have two telephones with the same number. During this period, your E911 service may be affected. A 911 call should go through, but the 911 operator may not be able to call you back if the call gets disconnected. For this reason, before porting either a wireless or

a wireline number, **ask the new company** how long the porting process will take and how it will affect a 911 call.

### **Handsets and Special Services**

In some instances, wireless handsets of different wireless telephone companies are incompatible. If you switch wireless companies, you may need to purchase a new handset, even if you retain the same phone number. If you have concerns about purchasing a new handset, **ask your new wireless company** whether or not your current handset will work with that company's network.

Also, be aware that, in a few areas, as consumers with ported numbers roam outside their normal wireless service areas, they may only be able to send and receive calls. Other services, such as caller ID, may not function properly.

### **How to File a Complaint**

If you have problems porting your phone number from one service provider to another, first try to resolve them with the responsible provider. If you cannot resolve the problem directly with the provider, you can file a complaint with the FCC. You can file your complaint electronically using the on-line complaint Form 475 (general complaint form) found on the FCC Web site at [www.fcc.gov/cgb/complaints\\_general.html](http://www.fcc.gov/cgb/complaints_general.html). You can also file your complaint by e-mailing [fccinfo@fcc.gov](mailto:fccinfo@fcc.gov); calling 1-888-CALL-FCC (1-888-225-5322) voice or 1-888-TELL-FCC (1-888-835-5322) TTY; faxing 1-866-418-0232; or writing to:

Federal Communications Commission  
Consumer & Governmental Affairs Bureau  
Consumer Inquiries and Complaints Division  
445 12th Street, SW  
Washington, D.C. 20554.

### **What to Include in Your Informal Complaint**

The best way to provide all the information the FCC needs to process your complaint is to complete fully the on-line complaint Form 475. If you do not use the on-line complaint Form 475, your complaint, at a minimum, should indicate:

- your name, address, e-mail address, and phone number where you can be reached;
- the names and phone numbers of any companies involved with your complaint;
- the type of service that you are complaining about;
- the telephone number or account number for any service you are complaining about;
- the names and phone numbers of any companies involved with your complaint;
- the date of any bill you are complaining about, the amount of the disputed charges, and the amount of any refund you have received;
- a brief description of the event or action you are complaining about; and
- the resolution you are seeking, such as a credit or refund or a clearer explanation of the charge(s).

### For More Information

For additional information on LNP, visit our Web site at [www.fcc.gov/cgb/NumberPortability/](http://www.fcc.gov/cgb/NumberPortability/).

For more information about this issue or any other telecommunications-related issues, visit the FCC's Consumer & Governmental Affairs Bureau Web site at [www.fcc.gov/cgb](http://www.fcc.gov/cgb), or contact the FCC's Consumer Center using the contact information provided above for filing a complaint.

*For this or any other consumer publication in an alternative format (electronic ASCII text, Braille, large print, or audio) please write or call us at the address or phone number below, or send an e-mail to [FCC504@fcc.gov](mailto:FCC504@fcc.gov).*

*To receive information on this and other FCC consumer topics through the Commission's electronic subscriber service, click on [www.fcc.gov/cgb/contacts/](http://www.fcc.gov/cgb/contacts/).*

*This document is for consumer education purposes only and is not intended to affect any proceeding or cases involving this subject matter or related issues.*

11/20/07



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**REICH DECLARATION**

IN THE UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF CALIFORNIA

PERSEUS DISTRIBUTION, INC.,  
and PERSEUS BOOKS, L.L.C.,

Plaintiffs,

Case No. \_\_\_\_\_

v.

CF COMMUNICATIONS, LLC D.B.A.  
TELEKENEX, INC.

Defendant.

**DECLARATION OF SUSAN REICH**

I, Susan Reich, declare under penalty of perjury as follows:

1. I am President of Perseus Distribution, Inc. ("Perseus Distribution"), which is doing business as Publishers Group West and PGW ("PGW") (together, "Perseus Distribution/PGW").
2. I submit this Declaration in support of Plaintiffs' application for a temporary restraining order ("TRO") and make the following statements on personal information.
3. Perseus Distribution/PGW is a book distributor. Certain of PGW's business assets were purchased by Perseus Distribution in a transaction approved by the U.S. Bankruptcy Court for the District of Delaware effective on or about September 28, 2007.
4. For approximately the past 10 years, PGW has used the following telephone and fax numbers in the conduct of its business:

510 528 1444 Main Phone  
510 528 3444 Main Fax  
510 528 5511 Sales Fax  
510 528 7211 Executive Fax  
510 528 8167 Credit Fax  
510 528 9555 Marketing Fax  
510 558 0156 Publisher Services Fax  
510 558 0422 Human Resources Fax  
800 261 7503 IT Dial In Pool  
800 788 3122 Customer Service line

(together the "PGW Phone/Fax numbers").

5. During this period of time, significant value in the PGW Phone/Fax numbers has accumulated -- they are known and recognized by our customers as being uniquely associated with Perseus Distribution/PGW's business.

6. From 2003 to 2007, Defendant Telekenex, Inc. has been the local exchange carrier for the PGW Phone/Fax numbers. In November 2007, Perseus Distribution/PGW notified Telekenex of its intent to change carriers. Perseus Distribution/PGW made this decision due to poor service by Telekenex, including instances of service interruption.

7. In fact, on December 14, 2007 Perseus Distribution/PGW switched local carriers from Telekenex to TelePacific Communications.

8. On the afternoon of December 14, 2007, Telekenex for the first time notified Perseus Distribution/PGW that it would not release the PGW Phone/Fax numbers to TelePacific Communications.

9. Perseus Distribution/PGW made the decision to switch carriers based in part on Perseus Distribution/PGW's understanding that it had the legal right to "port" the PGW Phone/Fax numbers to its new carrier. In other words, we believed that we could keep the same numbers even though we were switching carriers.

10. Perseus Distribution/PGW immediately notified Telekenex that its action in holding hostage the PGW Phone/Fax numbers was unjustified and would cause serious harm to the Perseus Distribution/PGW business. Telekenex responded by saying that it would not release the numbers unless Perseus Distribution/PGW paid a so-called "early termination fee" of \$120,000.

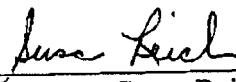
11. Perseus Distribution/PGW is unaware of any valid basis for this demand for an early termination fee.

12. Telekenex is still holding the PGW Phone/Fax numbers. This unjustified action is causing harm to Perseus Distribution/PGW's business.

13. Currently, if a customer attempts to use any of the PGW Phone/Fax numbers, the customer gets only a busy signal.

14. Notwithstanding Perseus Distribution/PGW's repeated requests that Telekenex release the PGW Phone/Fax numbers, Telekenex has refused or failed to respond.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.



Susan Reich

Dated this 3 day of January, 2008.